Delict in Scotland in 2017

I. Scotland

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A. Legislation

1. Limitation (Childhood Abuse) (Scotland) Act 2017, asp 13

1 This statute, in force since 4 October 2017, adds a number of new sections (17A–17D) to the Prescription and Limitation (Scotland) Act 1973. These new sections have the effect of removing the three-year limitation period (the triennium) which would otherwise be applicable to personal damages claims in respect of childhood abuse. To benefit from the lifting of the limitation period, the party who is claiming for the injuries must have been under the age of eighteen on the date when the injuries occurred (or in the case of continuing injuries, when the injuries began), the injuries must have derived from abuse (which includes sexual, physical, and emotional abuse, as well as neglect[1]), and the injured party must raise the claim personally.[2]

2 The new provisions have retrospective effect, extending to rights of action accruing before the coming into force of the provisions,[3] and additionally they grant some prior litigants a right to bring a new claim. Such a new claim is possible if a prior claim was disposed of by a court either under sec 17 of the 1973 Act (the section imposing the triennium) or under a relevant settlement,[4]

1 New sec 17A(2) of the 1973 Act, as inserted by sec 1 of this statute.
2 New sec 17A(1) of the 1973 Act.
3 New sec 17B of the 1973 Act.
4 New sec 17C(2) of the 1973 Act. A 'relevant settlement' is one (i) agreed by the parties to the initial action, (ii) entered into by the pursuer under the reasonable belief that the initial action was likely to be disposed of by the court by reason of sec 17, and (iii) one under which any sum of money which was required to be paid by the defender to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer's expenses in connection with bringing and settling the initial action: see new sec 17C(4) of the 1973 Act.

and it does not matter that the prior action was disposed of (even by way of absolvitor, ie an order of the court finding no liability on the defender's part).[5]

3 The triennium will continue to apply to childhood abuse cases where the defender satisfies the court that he/she would be substantially prejudiced were the action to proceed or where, having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed.[6]

4 The new Act is a significant change to the legal approach to childhood abuse claims, of which many unsuccessful examples have been mentioned in recent Yearbooks. Previously, the triennium provided for a three-year limitation period which could only be postponed to a determinable later date in cases where the pursuer could not reasonably have become aware that he/she had suffered injuries which were the result of another's act or omission and which were sufficiently serious to justify a claim until such determinable later date.[7] This meant that, in most childhood abuse cases, the victim would be expected to raise a claim at the latest when they became an adult. A further provision of the 1973 Act allowed (and continues to allow) the court to override the triennium in any personal injury case if it seemed to the court 'equitable' to do so, but the long passage of time between the occurrence of childhood abuse and claims for such abuse being raised has typically persuaded courts in the past that it would not be equitable to exercise such discretion.

5 The new provisions will allow many childhood abuse claims which would not previously have been admitted to be litigated. We can also expect to see old cases being reopened, given the retrospective effect of the new Law. It is likely therefore that next year's Yearbook may contain reference to the first batch of cases under the new provisions. It will be interesting to see how cautiously or generously the courts interpret the 'substantial prejudice' check on the new provisions. It may well be that, in cases where an exceptionally long period of time has passed since the abuse,[8] and/or many of the relevant witnesses or alleged perpetrators have died, the courts will still be unwilling to allow claims to proceed.

5 New sec 17C(3).
6 New sec 17D.
7 See sec 17(2)(b) of the 1973 Act.
8 Such as the more than 50 year period in the *K v Marist Brothers of the Schools* case referred to (no 69 below).

B. CASES

1. *C v G*, Court of Session (Outer House), 17 January 2017, [2017] CSOH 5, 2017 Scots Law Times (SLT) 79: Civil Damages Claim in Respect of Rape

a) Brief Summary of the Facts

6 The pursuer was a young woman who alleged that she had been raped by two men, the defenders. Despite a police investigation of the alleged rape, no prosecution was brought against the men by the public prosecutor. The woman subsequently raised a civil claim for damages against the defenders on the ground that their actions constituted the common law delicts of sexual assault and rape. The defenders argued that no delicts had been committed, because the woman had consented to sexual intercourse.

b) Judgment of the Court

7 The judge (Lord Armstrong) held that: (1) the act of rape was an actionable civil wrong and, whether the act was viewed as criminal or delictual, no material distinction arose in respect of its constituent elements; (2) this being a delictual claim, the standard of proof to be satisfied by the pursuer was that of the balance of probabilities (and not the higher criminal law standard of proof beyond reasonable doubt); and (3) the evidence of the pursuer—that she was, because of excessive consumption of alcohol, incapable of giving consent—was cogent, persuasive, and compelling. The judge therefore found in favour of the pursuer, and pronounced decree against the defenders, jointly and severally, in the sum of £ 100,000.[9]

c) Commentary

8 This is an historically significant decision, as it is the first occasion on which a civil claim for damages in respect of a rape has been successfully pursued before a Scottish court. The case attracted a degree of media interest, not just because of its legal novelty but on account of the defenders being professional footballers. The controversial decision of the Crown not to prosecute the men is not considered here, rather the focus is on the delictual aspects of the case.

[9] This judgment was appealed against: see [2017] Court of Session, Inner House (CSIH) 72, 2017 Scots Law Times (SLT) 1311. However, the appeal is not considered here because (a) it was unsuccessful, and (b) it related not to the legal basis of the claim but only to alleged errors of assessment of evidence.

9 A number of delicts in Scots law are also crimes[10] (including assault, rape, unlawful deprivation of liberty, and fraud), though the rise of competent national prosecution and police services, together with a statutory criminal injuries compensation scheme,[11] has largely undercut the rationale for damages claims in respect of such delicts. However, the possibility of utilising the civil law, rather than relying upon state actors to take remedial action on a victim's behalf, has continued to exist. The desirability of maintaining this parallel civil route is evident in a case where, as in this one, the criminal authorities decline (for whatever reason) to act.[12]

10 There are two points of law briefly worthy of note in this judgment. First, the court points out that the substance of the harm alleged is the same in the criminal and delictual law. So, a pursuer in a case of this sort knows that she must prove the same elements of her case as would be applicable in a criminal prosecution. However, she is advantaged by the lower, civil standard of proof required: she need only prove to the court that her version of the evidence is more persuasive than that of the defenders. Even if the pursuer's version of events is only just more persuasive by a small margin, that is enough to discharge the burden of proof. Without the advantage of the investigative resources of the police, this helps to counterbalance the evidence-gathering disadvantage from which a private party such as this pursuer may suffer.

11 The second point to note follows from the first point about the same legal requirements applying in criminal and delictual law. It relates specifically to the pursuer's capacity to consent to sexual intercourse, and what the defenders ought reasonably to have concluded about that. The pursuer was very drunk on the evening on which the events took place; the defenders however contended that 'at no time had the pursuer said "no"'.[13] The judge, drawing a parallel with the concept of consent in the criminal law of rape, notes:

> 'That, however, in a case of this sort, could never be determinative. The current state of the law, having regard to the modern defined meaning of consent … sends a clear signal that anyone dealing with someone who is intoxicated is put on notice that that person may not be able to give consent no matter what she says or does …'.[14]

[10] See further *J Blackie*, The interaction of crime and delict in Scotland, in: M Dyson (ed), Unravelling Tort and Crime (2014) 356–388.

[11] For further information, see <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority>.

[12] In addition to civil recovery, there is also the possibility (almost never successful) of a victim of a crime raising a private criminal prosecution under a procedure called a Bill of Criminal Letters.

[13] Para [343].

[14] Ibid.

That seems an entirely accurate summary of the current view of consent to sexual intercourse (which looks for the presence of active consent, rather than the absence of a refusal to consent), and explains the judge's conclusion that the defenders culpably ignored clear indicators that the pursuer was not capable of giving meaningful consent.

12 This ground-breaking decision may be unlikely to be repeated with much frequency, given that the unusual decision of the Crown not to prosecute on facts such as these must be rare. However, the decision is welcome in providing a clear basis for a future claim of this sort, if it is ever needed.

2. *Chalmers v Diageo Scotland Ltd*, Court of Session (Outer House), 3 March 2017, [2017] CSOH 36: Liability of Whisky Manufacturer for Release of Ethanol during Whisky Aging Process; Alleged Damage to Property Caused by Fungus Thriving on Ethanol; Whether Damage amounted to a Nuisance

a) Brief Summary of the Facts

13 The pursuers claimed damages from the defenders in respect of alleged damage caused to the pursuers' house and outdoor property by the release of ethanol vapour from maturing whisky casks stored by the defenders in bonded warehouses adjacent to the pursuers' home.[15] The alleged damage was the occurrence of a black fungus, thriving on ethanol, which coated the pursuers' home and other property. The pursuers argued that this damage was caused by the fault of the defenders, and that such fault amounted to an actionable nuisance.

14 The defenders argued, inter alia, that: (1) given that the defenders' business was longstanding and the pursuers were incomers, the pursuers had failed to set out an adequate case that, in the locality in which their property stood, the threshold laid down by the law of nuisance had been breached; (2) in any event, the pursuers' case failed the requirement for actionable nuisance that any alleged harmful impact must be more than reasonably tolerable (*plus quam tolerabile*); (3) regulation by expert public authorities, acting in the public interest, would be undermined by individual claims seeking to set individual standards. The regulatory regime specifically required the emission of ethanol from the warehouse, and such regulation balanced the interest of produc-

[15] The ethanol released during this whisky maturation process is commonly referred to as 'The Angels' Share': see judgment of Lord Ericht at para [1].

ers, the public, and individuals; and (4) that any right of action the pursuers might have had had prescribed.

b) Judgment of the Court

15 The judge held that the pursuers had pled a relevant case of nuisance, and ordered a proof before answer (a trial of the facts before determination of the legal arguments). In relation to the defenders' arguments specified above, the judge thought that: (1) there was some ambiguity in prior case law regarding whether, and if so how, the question of the pre-existing nature of a locality should be taken into account in an action of nuisance. This problem could be resolved only after proof (a trial of the facts); (2) the issue of whether the damage caused was *plus quam tolerabile* could only be determined after proof; (3) though the fact that regulations were being complied with might be relevant to whether an activity was a nuisance, only an examination of the facts could determine this in specific cases, and this was another reason why a proof was needed; and (4) it was unclear which of two sections (7 or 8) of the Prescription and Limitation (Scotland) Act 1973 might be applicable in this case, and that this ought also to be resolved after proof. In all of these circumstances, a proof before answer was ordered by the court.

c) Commentary

16 There could be few judgments more quintessentially Scottish than one about the manufacture of whisky. Whisky lovers might be somewhat perturbed that the manufacture of their favoured spirit might be argued to be a harmful act, but the facts of this case indicate how (if substantiated by relevant evidence) that might be so.[16]

17 A number of aspects of the judgment are of interest. First, there is the issue of the relevance of the nature of the locality to the question of whether a nuisance has occurred. Lord Ericht notes that the 'nature of the locality goes to the question of whether the use was *plus quam tolerabile*'.[17] That is undoubtedly correct: what, for instance, may constitute a nuisance in terms of noise in the locality of a busy airport is doubtless different to what might do so in the vicinity of a quiet country village. Somewhat more challenging is the extent to which, in assessing the character of a locality, the defender's conduct alleged to be the basis of the nuisance should or should not be taken into account. Lord Ericht's belief that the correct approach is unclear stems from a debate in English law between one view (promoted by Lord Neuberger in *Coventry and*

[16] There is a body of published literature relating to the ethanol-related growth of the fungus *baudoinia*, including an article cited in the judgment: *James A Scott et al*, *Baudoinia*, a new genus to accommodate *Torula compniacensis* (2007) 99(4) Mycologia 592–601.

[17] Para [16].

others v Lawrence and another)[18] that, when assessing the character of the locality, the defender's conduct should be left out of account,[19] and the inconsistent view (propounded by Lord Carnwath in the same case) that an 'existing activity can in my view clearly be taken into account if it is part of the established pattern of use'.[20] Lord Ericht expresses no view on this issue (unresolved, it seems, in Scots law), preferring to leave doing so until after a trial of the facts. The Neuberger view is more favourable towards potential claimants in instances where the defender is the only source of a harmful activity, as leaving such activity out of the equation when assessing the locality is likely to lead to a starker assessment of the impact of the defender's activities. No view is expressed by his Lordship on a further aspect of locality, whether (in Scots law) there is a defence of 'coming to the nuisance' (ie a defence that a pursuer chose to move into a locality where activities complained of were already being undertaken), or whether it may be relevant that a pursuer's change of use of its land has changed the effect of the defender's conduct such that it has become a nuisance.[21]

18 A second aspect worthy of note relates to the impact of regulatory compliance on a finding of nuisance. Differing views were again taken of this in the *Coventry* case, with Lord Carnwath adopting a minority approach which preferred to 'start from the presumption that the established pattern of uses generally represents society's view of the appropriate balance of uses in a particular area'.[22] Such an approach would give little, if any, room for nuisance to operate where there was compliance with regulations. By contrast, Lord Neuberger thought that 'the mere fact that an activity … has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity causes a nuisance to her land'.[23] That Lord Ericht avoids favouring one of these views cannot be criticised, given that his Lordship did not, at this stage of the proceedings, benefit from argument on the nature and content of the relevant regulations.

19 Finally, on the prescription issue, there was uncertainty as to whether sec 7 or 8 of the 1973 Act ought to govern the facts of the case: sec 7 provides for a long negative prescriptive period of twenty years, so as to extinguish rights to (among other things) reparation if no claim (or acknowledgment of such a claim) has been made for a continuous period of twenty years; sec 8 separately provides for a long negative prescriptive period of 20 years for certain unexercised or unenforced rights relating to property. Though the prescriptive

[18] *Coventry and others v Lawrence and another* [2014] United Kingdom Supreme Court (UKSC) 46.
[19] See judgment of Lord Neuberger, para [65] of *Coventry*.
[20] Para [187] of *Coventry*.
[21] See Lord Ericht's judgment at para [31].
[22] Para [183] of *Coventry*.
[23] Para [94] of *Coventry*.

period is the same, the date from which the period provided for under each section starts to run might conceivably be different, so it is important to know which section applies. There is no definitive case law on the matter, and academic views are (so the judge opined) inconclusive. The view of the court would thus have been of great interest here, but this was another matter which was said to be indeterminable until a trial of the facts.

20 This judgment raised a number of interesting issues, as detailed above. Frustratingly however (if understandably, given the procedural stage of the claim), while the court discusses these issues, no clear answers are given because of the suggestion that the facts need to be clear before the law, whatever it may be, can be decided and applied. Given the uncertain state of Scots law on a number of the questions raised in this case, it is to be hoped that the litigation may give rise to further reported stages which definitively address these matters.

3. *D Geddes Contractors Ltd v Neil Johnson Health & Safety Services Ltd*, Court of Session (Outer House), 14 March 2017, [2017] CSOH 42: Liability of a Health & Safety Consultant for the Criminal Conviction of its Client for Health and Safety Breach Resulting in Death of a Worker; *Ex turpi causa non oritur actio*

a) Brief Summary of the Facts

21 On 26 July 2012, Joseph Troup, an employee of the pursuer, sustained a fatal accident while working at the pursuer's quarry. Mr Troup, a lorry driver, was tipping materials into a feed hopper. At the edge of the raised area above the hopper there was a stop block, the purpose of which was to prevent lorries from reversing over the edge. As Mr Troup reversed his lorry, it passed over the stop block and fell into the hopper, killing him.

22 The accident was investigated by the Health and Safety Executive. It was found that tipped sand and gravel had built up in front of the stop block, allowing it to act as a ramp over which a large-wheeled vehicle was capable of driving. The pursuer was charged with a breach of Regulation 6 of the Quarries Regulations 1999. A plea of guilty was tendered, and the pursuer was fined £ 200,000.

23 At the time of Mr Troup's accident, the defender was engaged by the pursuer to provide health and safety advice concerning the operation of the quarry. As part of the provision of that advice, the defender undertook regular inspections of the quarry and supplied inspection reports to the pursuer. The pursuer sought to recover the £ 200,000 fine from the defender, arguing that an ordi-

narily competent health and safety adviser, exercising ordinary skill and care, would have advised it that the stop block was lower than the minimum height required by the relevant Approved Code of Practice, and of the need for the block to be as vertical as possible to avoid ramping. Had it been so advised, the pursuer argued that it would have taken the steps necessary to rectify those defects before the accident and resultant prosecution.

24 The defender denied that it had been negligent and argued that the cause of the accident was the purser's own negligence in failing to take measures to address the build-up of tipped materials in front of the block. The defender also advanced an argument founded upon a special application of the general policy of the law that *ex turpi causa non oritur actio*, ie that no action may be founded upon turpitudinous conduct. It argued that compensation was not recoverable for damage that flowed from loss of liberty, a fine, or other punishment lawfully imposed as a consequence of one's own unlawful act. This principle (it argued) precluded the pursuer from claiming the amount of its fine.

b) Judgment of the Court

25 The judge (Lord Tyre) held that the pursuer had pled a relevant case for recovery of the value of the fine. His Lordship held that, there being no Scottish authority on point, it was appropriate to look to English case law.

26 The question for determination was whether a 'strict liability' exception applies to cases where the loss that the claimant seeks to recover arises as a consequence of a punishment (or other disposal) imposed by a criminal court, and not directly as a result of the commission of a criminal act itself. Reviewing English authority, as well as a decision of the Singapore Court of Appeal, his Lordship held that there was no authority for the proposition that recovery of a loss consisting of a criminal penalty or the consequences of imposition of a criminal sanction is necessarily excluded by the *in turpi causa* principle.[24] What is important in each case is an assessment of the responsibility of the claimant: intentional wrongdoing on the part of the claimant is not the only basis upon which a right of recovery of criminal penalties may be excluded by the *ex turpi causa* principle – negligence may also do so. It might be that the pursuer had been negligent in this case, but that could only be determined by a proof before answer (a trial of the facts followed by determination of the relevant law), which his Lordship therefore ordered.

[24] Para [17].

c) Commentary

27 This judgment is of interest in a number of respects: it considers a matter not apparently settled in Scots law; it makes commendable use of comparative authority in reaching a principled conclusion; and it analyses whether a distinction between types of *ex turpi causa* case ought to be reflected in a difference in outcome.

28 Scotland is a small jurisdiction, and one of the consequences of this is that from time to time a matter will arise for adjudication without any clear legal rule existing for its determination. In such cases, courts may decide by analogy, by arguing for an extension of the rules from principle, and/or by reference to comparative legal material. So far as doctrine in this field is concerned, there is an established principle of *ex turpi causa*, but its ambit in Scottish decisions has historically been in relation to what is styled the 'wider' form, ie a rule that compensation is not recoverable for loss suffered as a consequence of one's own criminal act, rather than a so-called 'narrower' form, ie a rule that compensation is not recoverable for damage that flows from loss of liberty, a fine or other punishment lawfully imposed as a consequence of one's own unlawful act.[25] The wider form thus deals with direct consequences of 'turpitudinous conduct', the narrower form with more remote consequences (those requiring the subsequent intervention of the courts adjudicating upon the conduct).

29 In this case, the judge chose to make substantial use of comparative judgments, mostly English (from *Burrows v Rhodes and Jamieson*[26] to *Les Laboratoires Servier v Apotex Inc*[27]) as well (more unusually) as a decision of the Singapore Court of Appeal.[28] These were used to show a consistent view of Common Law courts that: (1) the narrow and wider aspects of the *ex turpi causa* rule should be treated in the same way, and (2) the appropriate approach, in all cases, to whether a civil claim deriving from the claimant's criminal conduct should be excluded involves a balancing of policy considerations. Lord Tyre's suggestion that, in undertaking such a balancing exercise, regard should be had to the 'responsibility' of the claimant, whether deriving from intention or negligence, puts the matter in a commendably clear way and helps to explain prior comparative case law (including cases excluding claims where the claimant was negligent). Such a view mandates, of course, a trial of the facts to determine where negligence was present, hence the order made by the court in this case.

[25] See a discussion of these two forms, by reference to the speech of Lord Hoffmann in *Gray v Thames Trains Ltd* [2009] United Kingdom House of Lords (UKHL) 33, [2009] 2 Appeal Cases (AC) 1339, at para [32], in Lord Tyre's judgment at para [6].

[26] [1899] 1 Queen's Bench (QB) 816.

[27] [2015] AC 430.

[28] *United Project Consultants Pte Ltd v Leong Kwok Onn* [2005] Supreme Court of Singapore (SGCA) 38.

30 This is a welcome decision, adding useful clarity (albeit only at the level of a first instance judgment) to a previously unconsidered question of Scots law. It is to be hoped that the approach will be affirmed by higher courts.

4. *Huntaven Properties Ltd v Hunter Construction (Aberdeen) Ltd and others*, Court of Session (Outer House), 30 March 2017, [2017] CSOH 57: Liability for Defectively Constructed Concrete Works; When Prescription Operates to Extinguish Claims for Liability

a) Brief Summary of the Facts

31 The pursuer owned a pipe storage facility in Aberdeenshire. In 2008–2009 a large concrete slab was constructed at the yard. Following its completion, initial defects in the slab (the absence of air entrainment[29] and fibres) were observed in September 2009, more substantial defects being observed in February 2010. The pursuer did not, at those times, have the cause of these investigated. In March 2010, the pursuer instructed the first defender to make good the defects. Repairs were carried out between August and November 2010, and on 16 November 2010, following an inspection, a making good defects certificate was issued on behalf of the pursuer. On 11 February 2011, a final payment was made by the pursuer for the work. Until May 2011, it appeared that the remedial work had been effective, but thereafter defects again became apparent.

32 The pursuer claimed that each of the four defenders was responsible for the defects through breach of a number of obligations. It sought damages of £ 3.6 million from them jointly and severally for breach of contract, and in relation to the first defender (the main contractor) and third defender (a consulting engineering firm) it also alleged concurrent liability in delict. Apart from the second defender (an insolvent subcontractor, which had had decree in absence pronounced against it), each of the other defenders denied liability, as well as argued that any obligation to make reparation to the pursuer had prescribed by virtue of the five-year prescriptive period applicable by virtue of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act').

33 The defenders argued that the breaches giving rise to each of the obligations to make reparation occurred and were completed before the date of practical completion of the work, and that the pursuer was aware (or could with reasonable diligence have been aware) of relevant material loss, injury, or damage

[29] Air entrainment is the intentional creation of small air bubbles within concrete in order to make the concrete more durable.

more than five years before a claim in relation to each of the obligations was made. The pursuer argued, inter alia, that: (1) none of the obligations founded upon became enforceable before 16 November 2010 because before that date the pursuer suffered no loss; (2) each of the defenders' acts, neglects, or defaults had been a continuing act, neglect, or default which had not ceased until at least the certificate of making good defects was issued, and possibly until the final payment; and (3) the pursuer was not aware, and could not with reasonable diligence have become aware, that it had suffered loss until May 2011. Prior to that date, although it had become aware of defects in the slab, it had not suffered a loss because the first defenders had been obliged to remedy those defects and had appeared to do so.

b) Judgment of the Court

34 The case called before Lord Doherty for a preliminary determination of the pleas relating to prescription. For the purposes of this determination, his Lordship treated both the contractual and delictual claims together (as the two bases for each claim were alleged to give rise to an equivalent duty to make reparation). He held that the slab contained latent defects from the outset because of the absence of air entrainment and because the fibres had been poorly mixed.[30] Neither those defects, nor the manifestation of physical damage when it occurred, were transitory. Material damage had become apparent in September 2009.

35 In relation to the first defender's obligation to make reparation for its failure to mix the fibres into the concrete properly, the court held that *prima facie* there was concurrence of *injuria* (injury) and *damnum* (damage) by 22 February 2010, and in respect of the third defender's obligations to make reparation, *prima facie* there was concurrence of *injuria* and *damnum* by 21 September 2009.[31] By those dates, *prima facie* each of those obligations had become enforceable (under secs 6 and 11(1) of the 1973 Act[32]). The court added that the existence of contractual remedies in respect of the damage did not postpone the occurrence of *injuria* or *damnum* until the end of the defects liability period nor did it exclude the pursuer's common law right to damages. The authorities did not support the view that a provision such as the clause (17.2) in the main contract requiring defects to be remedied postponed the concurrence of *injuria* and *damnum* until the expiry of the defects liability period.[33]

30 Para [54].
31 Para [52].
32 Sections 6 and 11(1) have the effect that if, after the date when loss, injury, or damage occurs, an obligation to make reparation has subsisted for a continuous period of five years without a relevant claim having been made or the subsistence of the obligation having been acknowledged, it prescribes.
33 Para [57].

36 In relation to the alleged breach by the first defender of the repairing obligation in clause 17.2, there was no concurrence of *injuria* and *damnum* until there had been defective performance of the obligation to make good the defects,[34] and this obligation had *not* elapsed by virtue of the five-year prescriptive period before the claim had been raised.

37 As regards potential postponement of the start of the prescriptive period applying to the various obligations at play: in relation to the first defender, once the slab had been constructed and handed over, each of those acts, neglects, or defaults had been completed, and this was not undermined by the fact that some of the first defender's obligations under the contract fell to be performed after practical completion;[35] and in relation to the third defender, if its obligation to the pursuer to exercise reasonable care, skill, and diligence in carrying out its services as structural engineer for the project had indeed been breached, then this occurred, at the latest, by the time of practical completion. In each case no postponement of the commencement of the prescriptive period was applicable.

38 The court thus held that the pursuer's claim against the first defender for failure to remedy the notified defects had *not* prescribed, but that that against the third defender for alleged breach of its duty to take reasonable care had done so. Having given judgment on the issues relating to prescription, Lord Doherty remitted the case for a discussion as to further appropriate procedure.

c) Commentary

39 Claims raising arguments about the prescription of obligations are notoriously complex. They require a close analysis of the relevant statute (in Scotland, the 1973 Act) as well as a clear understanding of the specific obligation said to have been breached. In this case, the obligations alleged to have been breached by the defenders were said to lie (in the case of two of the defenders) in contract and concurrently in delict. For the purpose of the preliminary determination of the issues around prescription, the court worked from the assumption that delictual obligations were owed by the two defenders, and thus simply looked at the specific claims as being for reparation (damage) without concerning itself any further with the underlying cause of action.

40 The first defender (the main contractor) was alleged to have failed in its duties in a number of respects, by: (i) failing to take adequate steps to mix the fibres into the concrete and ensure that they were evenly and properly spread throughout the slab; (ii) failing to warn the pursuer of the absence of air entrainment within the slab and that such absence would make the failure of the

[34] Para [59].
[35] Paras [65]–[66].

slab inevitable; and (iii) using concrete not in accordance with good building practice. Each of these failures occurred at different times, so that in relation to the failure to perform each, a different start point for the prescriptive period would apply. Calculation of the relevant date from which the prescriptive clock ought to run in respect of faulty construction causing (initially) latent damage is a difficult matter, and there is a developed body of case law analysing when damage may be taken to have been discovered (or discoverable) and thus actionable. In this case, the judge had to consider whether the damage to the slab which manifested itself might be only 'transitory' and likely to be remedied by the carrying out of the subsequent stages of the work. His conclusion that it was not merely transitory seems a reasonable one.

41 Additionally, the main contract in this case provided for a mechanism (in clause 17.2) by which the pursuer could order defective work to be remedied within a fourteen-day period. A failure by the contractor to undertake such remedial work properly would trigger a separate duty of reparation, one attracting its own prescriptive period. This turned out to be beneficial to the pursuer, for while the prescriptive period for some of the other claims had expired, that in respect of the breach of this duty had not. The court considered that it was only from the date when the remedial works were certified as having been carried out properly (which it transpired they had not) that the prescriptive period began to run, and noted that a claim for breach of the duty of repair had been raised within five years of this date (and so was validly raised). This view rests on the idea that, a certificate having been issued stating that repairs have been done, it is from the point of issuance of such certificate that defective performance of the obligation can be said to have occurred. This seems a reasonable approach to the issue of when damage in respect of this duty occurred, though it is noteworthy that the court did not consider, in relation to the obligation to make reparation for this damage, whether postponement of the prescriptive period might be argued to have applied under sec 11(3) of the Act (because it took several months for the pursuer to become aware that the remedial work had not been properly undertaken). It did, however, consider postponement arguments in relation to other alleged breaches of obligation (as discussed in the following paragraph).

42 In relation to the court's conclusions on postponement of the running of the prescriptive clock in relation to some of the obligations (narrated at no 37 above), the court makes the clear point that the contractor's obligation to do the work of the contract (such as the competent mixing of the concrete) is different to the obligation to undertake competent repairs when instructed to do so. That being so, the damage flowing from the defective performance of the work occurred earlier than that flowing from the defective repairs, and the obligation to make reparation for the first sort of damage prescribed earlier than the second sort of damage. Additionally, the judge notes—so far as the third defender's duty was concerned—that the general duty to exercise skill and care in the work done is different to any duty which might have existed on the

third defender (though such a duty was not argued for by the pursuer) to review the fourth defender's design after the slab had been constructed and to warn the pursuer at that stage of the absence of air entrainment. Had such a duty been argued for, it would have been subject to a different prescriptive period.

43 This, like many cases on prescription of duties in the construction industry, required resolution of a complex mix of factual and legal issues. It serves as a reminder of the importance to potential claimants of reflecting on the existence of multiple potential duties (such as that of repair): the more such duties can be argued for, the greater the likelihood that at least one of the duties has not yet prescribed.

5. *JD v Lothian Health Board*, Court of Session (Inner House), 28 April 2017, [2017] CSIH 27: Appeal against Finding of No Medical Negligence; Damages Claim for Distress, Anxiety, and Humiliation

a) Brief Summary of the Facts

44 The pursuer raised an action of damages for £ 125,000 alleging negligent misdiagnosis of late onset hypogonadotrophic hypogonadism (diminished gonadal function) by a medical practitioner and a subsequent failure to connect this condition to his childhood asthma. The pursuer's claim (which had been brought by him personally, without legally qualified assistance) was in respect of the shock, emotional distress, anxiety, sleep deprivation, and fear which he alleged he had suffered as a result. The claim was dismissed at first instance on the ground of irrelevancy, and the pursuer appealed against that dismissal.

b) Judgment of the Court

45 The Inner House upheld the dismissal of the case at first instance. It found that (1) the pursuer's written pleadings did not sufficiently and clearly set out allegations of misconduct supportive of a finding of medical negligence. The majority of the appeal bench might have been willing to overlook that failing on its own,[36] Lord Brodie remarking that 'where a pursuer is not professionally represented I consider that the court should be slow to dismiss his case on that ground alone where there is an alternative means of providing his opponent with the notice to which he is entitled',[37] and, had that been so, the case might

[36] Lady Clark was less sympathetic to the idea of resolving the procedural problems in the pursuer's favour: see paras [55] to [56].

[37] Para [39].

have been remitted back to the court at first instance to cure this defect; however, in addition, (2) the types of loss which the pursuer claimed to have suffered were not of themselves sufficient to found a damages claim, and this was fatal to the claim.

c) Commentary

46 This judgment illustrates very well two important aspects of pleading a claim for damages in delict: (1) a relevant ground of action must be pled; and (2) a relevant form of loss or damage must be averred. The appeal court were willing to be procedurally flexible as regards the first of these, but the second proved to be an insurmountable substantive barrier to the claim.

47 The pursuer's claim undoubtedly suffered because he had brought the action as a party litigant, without the benefit of legal assistance. This caused quite a few problems during the course of the litigation. The judge at first instance had had to spend some time explaining aspects of procedure to the pursuer, and Lord Brodie noted on appeal that 'the pursuer's averments contained much extraneous and irrelevant material'.[38] The appeal court recognised that these difficulties meant that he had not adequately pled the crucial issue in a claim of medical negligence, namely: whether the medical practitioner 'has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care'.[39] That the majority of the appeal court felt that this problem of the adequacy of the pleadings could have been dealt with procedurally (a mechanism for doing so was suggested) demonstrates a commendable effort by the judges to promote access to justice by assisting party litigants wherever possible. However, where problems with a party litigant's claim are not merely procedural but also substantive, a court cannot cure those problems.

48 The substantive problem with the claim was explained by Lord Brodie as being that in:

> 'an action based on negligence, where there is no physical injury, damages are simply not awarded for shock, fear, anxiety or grief, unless they go the distance of amounting to an identified psychiatric illness. On this ground alone, in other words because the pursuer does not offer to prove any physical injury or any identifiable psychiatric or psychological disorder or condition, the Lord Ordinary held that the action could not succeed and should be dismissed. In my opinion he was right to do so.'[40]

[38] Para [4].
[39] Lord President Clyde in *Hunter v Hanley* 1955 Session Cases (SC) 200 at 204.
[40] Para [43].

This accurately summarises the requirements of the law of recoverable damages, and it identifies a fatal flaw in the pursuer's claim. Had he been professionally advised, this would have been identified at the beginning of the process and it is very unlikely that a claim would ever have been brought.

49 The case serves as a reminder of the perils and pitfalls of a layperson raising his/her own legal claim, without the benefit of advice on the form or merits. It is also a reminder of the limits of actionable damages in personal injury claims: claims for distress and anxiety are actionable within the context of recognised psychiatric illness, but not otherwise unless consequent upon a physical injury.

6. *Cruden Building & Renewals Ltd v Scottish Water*, Court of Session (Outer House), 5 July 2017, [2017] CSOH 98, [2017] BLR (Building Law Reports) 575: Liability of Water Operator to Contractor for Leakage of Polluted Water Resulting in Delay to Building Operations

a) Brief Summary of the Facts

50 The pursuers, a building company, claimed damages for an escape of polluted water from the defenders' sewer onto a site on which the pursuers were carrying out building works. The development of the site had been arranged under a contract entered into between the owner of the land, a housing association, and a developer (a related company of the pursuers). The related company had alienated its licence to enter on the site to the pursuers in order for the pursuers to carry out the construction works.

51 The pursuers' claim was based on fault and negligence, breach of statutory duty, and nuisance. As a result of the escape of the polluted water, the pursuers had been delayed in carrying out the contract work, which had resulted in their suffering economic loss.

52 The defenders disputed that the pursuers had title and interest to sue, given that the pursuers were not the owners of the land which had been affected by the polluted water. The pursuers answered that they had a 'possessory interest' in the site, and that their comfortable enjoyment of the site had been compromised by the inundation of the water.

b) Judgment of the Court

53 Judgment in the Outer House was given by Lord Bannatyne. His Lordship thought that the pursuers' claim for economic loss was inextricably linked to

the damage done to the building site, and that the governing principle relating to claims for damage to property was that set out by Lord Brandon in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd*[41] (later approved by the Scottish courts in *Nacap Ltd v Moffat Plant Ltd*[42]):

'in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.'[43]

One of the prior authorities,[44] which Lord Brandon had drawn upon in formulating that principle, was a case involving water damage to property not owned by the plaintiff who unsuccessfully sought to recover its economic losses.

54 Lord Bannatyne further thought that cases indicating that tenants have a right to sue for economic losses deriving from their tenancy of land (which gives them an interest comparable to that of the owner) did not assist the pursuers, as the pursuers were not lessees. Similarly, authority indicating that possessors without a lease whose interest was nonetheless comparable in extent to that of a tenant was equally unhelpful for the pursuers, given their own very limited right in relation to the land.

55 In consequence, the court dismissed the action against the defenders.

c) Commentary

56 This decision seems correct in principle and consistent with prior authority. The courts are reluctant to allow recovery for pure economic loss (such as that suffered by the pursuers) and require that there be a sufficiently close relationship (one of so-called 'proximity') between pursuer and defender before such a claim can be made. In relation to a landowner and a contractor working on neighbouring land, there would not normally be anything in such a relationship to indicate the presence of the necessary degree of closeness of relationship between the parties. In terms of possible proximity in this case, the judgment narrates nothing about any communications between the pursuers and defenders, or indeed whether the defenders even knew the identity of the pursuers at the time when the damage occurred. Proximity exists between neighbouring landowners by virtue of their respective rights of adjacent ownership,

41 [1986] AC 785.
42 1987 SLT 221.
43 *Leigh and Sillivan* at 809.
44 *Cattle v Stockton Waterworks Co* (1875) Law Reports (LR) 10 QB 453.

but of course the pursuers were not the owners of the land. The farthest that the Scottish courts had previously gone in granting a non-owner a right to claim for economic loss caused to property owned by another was in a case in which they allowed such a claim by a party whose unfettered possessory right to use a helicopter owned by another was sufficiently extensive as to be comparable to that of a lessee.[45]

57 In Scotland, as in England, this limitation upon the rights of non-owners to claim economic losses deriving from damage to another's property is clearly grounded in policy, a policy favoured by the court in the *Nacap* case because '[t]he rule is simple to understand and easy to apply; it is important that there should be certainty in law.' More fundamentally, of course, the policy is grounded in a desire to contain damages claims within acceptable and manageable bounds: if the requirement of ownership (or lease) of the damaged property were abandoned, then there might be countless parties who could conceivably claim for economic losses flowing from damaged property.

58 One somewhat unhelpful aspect of the judgment is that, although the pursuers advanced their claim on multiple grounds – negligence, breach of statutory duty, and nuisance – the judgment of the court does not consider these various grounds separately. In dismissing the pursuers' claim, the judge focuses on an ownership requirement in title to sue in respect of damaged property which derives from prior negligence cases. Whether that rule is equally applicable to claims founded in the nominate delict of nuisance and in breach of statutory duty is not explored or explained by the court in the judgment.

7. *Kaizer v Scottish Ministers*, Court of Session (Outer House), 22 August 2017, [2017] CSOH 110: Liability of Prison Authorities for Assault by Inmate on Fellow Inmate

a) Brief Summary of the Facts

59 The pursuer was an inmate at Aberdeen Prison. He was severely assaulted in the prison gym by a second inmate, who was subsequently convicted for attempted murder in relation to the assault. The second inmate had previously threatened to assault the pursuer. A prison guard, though made aware of this by the pursuer, had failed to take any further action. The pursuer sued the defenders as being liable for the failings of the prison service. He alleged that they had breached a duty to take reasonable care for the safety of those within their prisons, including prisoners. The defenders accepted that such a duty rested on them but denied that they were in breach of it.

[45] *North Scottish Helicopters Ltd v United Technologies Corp Inc (No 1)* 1987 SLT 77.

b) Judgment of the Court

60 The judge (Lord Ericht) held that, on the facts of the case, the five requirements laid down by Lord Diplock in *Home Office v Dorset Yacht Co Ltd*[46] for establishing the tortious liability of prison authorities (A) for the conduct of a prisoner in their care (C) for harm to another (B) had been met, namely: (1) that A had the legal right to detain C in penal custody and to control his acts while in custody; (2) that A was actually exercising that right at the time of C's tortious act; (3) that A, if it had taken reasonable care in the exercise of its right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B; (4) that the relationship between A and B had the characteristics that, at the time of C's tortious act, A had the legal right to control the situation of B or his property as respects physical proximity to C; and (5) that A could reasonably have foreseen that B was likely to sustain damage to his person or property if A did not take reasonable care to prevent C from doing tortious acts of the kind which he did. The judge therefore held the defenders liable in damages in an amount to be determined at a later hearing.

c) Commentary

61 The liability of prison authorities for attacks by one prisoner on another is highly dependent on the specific facts of the case. Prisons can be violent places, but not all prisoners demonstrate violent tendencies. Where there has been no past history of violence on the part C, or of ill will on C's part towards B coupled with opportunity being afforded to C to attack B, then it is likely not to be reasonably foreseeable that C will attack B (a point noted in the earlier case of *Leslie v Secretary of State for Scotland*[47]). Where a prison guard fails to pass on threats made towards specific prisoners, this has previously been thought to tend towards liability if those threats are acted upon.[48] Such threats constitute specific, crystallised risks to the well-being of an inmate, making harm to such an inmate reasonably foreseeable. There is thus a duty resting upon prison staff to act upon them. More generalised threats of prisoners wanting to harm others generally, but not a specific person, may well however not trigger liability,[49] given that the management of such inchoate threats is an unavoidable part of prison life.

62 So much for the decision on the facts. What, however, if what were to be discovered was a threat by a prisoner to harm someone outside of the supervisory scope of the prison, for instance a member of the public? If such a threat were subsequently acted upon by the prisoner (either personally, when later at

[46] [1970] AC 1004.
[47] 1999 Reparation Law Reports (Rep LR) 39.
[48] *Whannel v Secretary of State for Scotland* 1989 SLT 671.
[49] See *Stenning v Secretary of State for the Home Office* [2002] England & Wales Court of Appeal, Civil Division (EWCA Civ) 793.

liberty, or through arrangements made by the prisoner to have the harm committee by someone presently at liberty), ought the prison authorities to be liable for their failure to act upon it? The test from *Dorset Yacht* narrated above would be inapplicable given the parties involved, but would liability nonetheless arise? While one might expect that, from a moral standpoint, the prison authorities ought to report the matter to the police, it would be a stretch at common law to establish a duty of care for harm committed outside the area of control of those authorities, albeit that the instigating party was within that area of control. Reasonable foreseeability of harm might be present on such facts, but the worrying prospect of making prison authorities liable for harm committed by persons not within their control would be likely to lead to the harm being held too remote from the authorities to give rise to a duty of care on their part.

63 The decision is an important reminder for the prison authorities that all staff must ensure that threats made by prisoners against fellow inmates or members of staff must be reported and acted upon; if they are not, and the prisoner or staff member threatened is harmed, the prison authorities are likely to be found to have breached their duty of care.

8. Personal Injury

64 A couple of noteworthy cases of personal injury resulting from alleged local authority negligence were handed down in 2017. In the first, *Pocock v Highland Council*,[50] the pursuer sought to hold the Council liable when he slipped and fell as a result of a paving slab which was misaligned. Such cases of poorly maintained pavements and roads are on the rise, as Councils seek to trim their budgets by delaying repairs to infrastructure. In this case, however, the Council avoided liability because the pursuer failed to prove by exactly how much the paving slab had been misaligned; a very minor misalignment, which this might have been, would be unlikely to have justified a claim that failure promptly to realign it demonstrated negligence on the Council's part.

65 In the second case, *Bowes v Highland Council*,[51] the driver of a pickup truck had been killed when his vehicle had swerved as it approached a bridge, crashing into a weakened parapet and falling into a river. The court, reviewing previous Scottish authorities on the issue, felt obliged to follow the law applied in those authorities, *viz* that a Council owes road users a common law duty of care for failures to remedy hazards caused by the state of the roads (and, by extension, road bridges). The fact that English law recognises a duty of that scope was thought by the court to be irrelevant. The Council was held

[50] [2017] CSOH 40, 2017 Rep LR 69.
[51] [2017] CSOH 53, 2017 SLT 749.

liable for the driver's death on account of its failure properly to maintain the parapet. The fact that the evidence showed that the deceased had not been driving carefully at the time of the accident was held to be irrelevant, because, had the parapet been properly maintained, the vehicle would have been contained and the pursuer would not have died.

66 A further noteworthy case is one of the last to be brought under the unreformed law relating to the prescription of claims for childhood abuse, prior to the coming into force of the Limitation (Childhood Abuse)(Scotland) Act 2017 (considered at nos 1–5 above). *K v The Marist Brothers*[52] was an unsuccessful appeal against a first instance decision not to waive the triennium in respect of a claim for damages for childhood physical and sexual abuse. The alleged abuse occurred between around 1962 and 1965, more than 50 years before the action was raised. The appellant tried to argue that he had been disabled from pleading by 'unsoundness of mind'[53] as a result of the abuse, but he had not led any expert evidence on this. Additionally, the appeal court stated that the defenders would be materially prejudiced were the claim to be allowed at this stage, given the length of time which had passed since the alleged abuse. The decision seems a reasonable one, on both points. Moreover, given new sec 17D to the 1973 Act, which in the case of historic childhood abuse, continues to apply the triennium in cases where the defender satisfies the court that he/she would be substantially prejudiced were the action to proceed, one can speculate that the changes to the law brought in by the 2017 Act might well not have availed the pursuer in this case.

C. LITERATURE

1. *Frank McManus*, Delict Law Essentials (Edinburgh University Press, 3rd edn 2017)

67 This is a new (third) edition of an introductory guide to the law of delict in Scotland. Its target market is the student market, for which it is most suited given its attempt at comprehensive, entry-level coverage of the law.

[52] [2017] CSIH 2, 2017 SC 258.

[53] A ground for postponing the running of the triennium: see sec 17(3) of the Prescription and Limitation (Scotland) Act 1973.

2. *Frank McManus*, Employers' liability for the performance of hazardous activities by an independent contractor in the law of Scotland—a time for change? Juridical Review 2017, 231–246

68 This article considers the potential delictual liability of parties who engage independent contractors to perform inherently hazardous work. The author, who points out that case law on this grey area is sparse in both Scotland and England, argues that the imposition of strict liability in such cases is anomalous so far as the law of Scotland is concerned. He argues that the rule imposing strict liability (or a non-delegable duty) on the part of an employer for harm which is caused by an independent contractor should be abolished.

3. *Eleanor J Russell*, Historic Abuse – The Saga Continues, Scots Law Times 2017 (News) 67–77

69 The author examines the changing law on the recovery of civil damages in respect of historic childhood abuse, focusing on the *K v Marist Brothers* case (discussed at no 60) and the Bill which later became the Limitation (Childhood Abuse)(Scotland) Act 2017 (discussed at nos 1–5 above). The author describes the change to the law as 'a considerable change of emphasis in policy terms', while noting that there will continue to be safeguards to prevent defenders from being substantially prejudiced by waiver of the triennium.